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No. 03-1566

In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE STATE OF CALIFORNIA BY AND THROUGH THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE*

Amicus Curiae the State of California by and through the California State Water Resources Control Board submits this brief supporting respondents; all parties have consented to its filing.[1]

INTERESTS OF THE *AMICUS CURIAE*

The State of California has an important interest in the proper application of its water laws. "The present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 701 (1933). "All water within the State [of California] is the property of the people of the State, but the right to use of the water may be acquired by appropriation in the manner provided by law." California Water Code §102.

In support of their argument that they are intended third-party beneficiaries of the contract between the U.S. Bureau of Reclamation and the Westlands Water District, Petitioners claim an equitable property right in the water they receive from the U.S. Bureau of Reclamation, and claim that the property right is appurtenant to their land. Petitoners' Brief on the Merits, p. 36. This is incorrect.

The State through the California State Water Resources Control Board in Revised Water Rights Decision

[1] No counsel for any party to the case authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief. *See* S.Ct. Rule 37.6.

1641[2] (D-1641), has expressly rejected the trust and appurtenance water right theories advanced by Petitioners. Revised Water Rights Decision 1641, pp. 91, 126-130 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. A California trial court, Sacramento County Superior Court, has upheld the California State Water Resources Control Board's reasoning under those portions of D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 41-49 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. Westlands Water District was a party to that trial court proceeding. *Id., at* p. 1. Decision 1641 is currently under consideration by the California Court of Appeal, Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

To the extent that the Court's determination of the question presented turns on application of California water rights law, the State of California has an important interest in the Court's proper understanding and application of that law, so that nothing in the Court's opinion does harm to the State of California's authority to administer its system of water rights and to protect the State's water resources for all its people.

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[2] D-1641 implements the water flow objectives contained in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, and approves changes to points of diversion, place of use, and purpose of use for the Central Valley Project. Revised Water Rights Decision 1641, p. 1 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf.

SUMMARY OF ARGUMENT

Petitioners have invited the Court to determine whether they are intended third-party beneficiaries to a contract between the United States Bureau of Reclamation and the Westlands Water District by analyzing, in part, California water rights law to define the legal relationship between the United States Bureau of Reclamation, the Westlands Water District, and the Petitioners – individual farmers who make up the Westlands Water District. *See* Petition for a Writ of Certiorari, pp. 22, 25; Petitioners' Brief on the Merits, pp. 34-41. Petitioners erroneously claim that under California law individual farmers who receive water from a special purpose district "equitably own the water right under the law of prior appropriation, and it [the water right] is appurtenant to their lands." Petitioners' Brief on the Merits, p. 36. *Amici Curiae* Central San Joaquin Water Conservation District erroneously claims that "Petitioners hold water rights that entitle them to receive all the water from the reclamation project that they can beneficially use." Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, p. 20.

These contentions do not accurately describe Petitioners' interest under California law in receiving water from the Bureau of Reclamation. Under California law Petitioners do not have an equitable property right in the water they receive from the Bureau of Reclamation. *Ivanhoe Irrigation District v. All Parties (Ivanhoe II)*, 53 Cal.2d 692, 715-716 (1960).

California's law of appurtenance does not establish any property interest in this case. Rather the state's law of appurtenance establishes a limitation on the place of use

of water, and may recognize an easement on real property when the owner of real property also owns an associated water right. California Water Code §§1260(f) & 1701; *Stanislaus Water Co. v. Bachman,* 152 Cal. 716, 724 (1908). In this case, the United States, not the Petitioners, holds the permit for the water rights at issue. Westlands Excerpts of Record, filed 6/25/01, p. 233. And the contract between the Westlands Water District and the Bureau of Reclamation creates no easement in the water delivered to Petitioners. Joint Appendix On Writ of Certiorari, pp. 27-92.

Therefore, under California law Petitioners have no property interest in the water they receive from the Bureau of Reclamation. California Water Code §§1260(f) & 1701; *Stanislaus Water Co. v. Bachman,* 152 Cal. at 724.

Finally, Petitioners and *Amici Curiae* Central San Joaquin Water Conservation District cite *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 463 U.S. 110 (1983), to establish a property right to the use of surface water at issue in this case for irrigation appurtenant to the land, subject to beneficial use. *See* Petitioners' Brief on the Merits, pp. 37-41; Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, pp. 20-21. *Amici Curiae* describe this law as a body of "Western water law." *Id.* at p. 20.

However, so called Western water law is not a uniform body of law. Rather it is made up of the distinct water laws of the individual western states. In *Ickes, Nevada,* and *Nebraska*, the Court's conclusions were based on application of the water laws of those individual States, and federal reclamation law, not a general body of so called

Western water law. *Ickes*, 300 U.S. at 93-94; *Nebraska,* 325 U.S. at 599-600, 611-615; *Nevada*, 463 U.S. at 121-127.

Under the federal law of the Central Valley Project Improvement Act, section 8 of the Reclamation Act, and *California v. United States*, 438 U.S. 645, 674-679 (1978) Petitioners have no vested property interest in the water they receive from the Bureau of Reclamation which is appurtenant to their land. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a) (October 30, 1992); 43 U.S.C. §372; *California v. United States*, 438 U.S. at 674-679.

Because, under either federal or California law, Petitioners do not have a vested property interest in the water they receive, the Court should not now use the *Ickes* line of cases as a basis for establishing a property interest in California water inconsistent with Petitioners' rights under California water rights law.

ARGUMENT

I. UNDER CALIFORNIA LAW PETITIONERS' INTEREST IN THE WATER THEY RECEIVE FROM THE BUREAU OF RECLAMATION IS NOT AN EQUITABLE PROPERTY RIGHT APPURTENANT TO THEIR LANDS

A. CALIFORNIA DOES NOT RECOGNIZE THE TRUST THEORY ADVANCED BY PETITIONERS

Petitioners claim an equitable property right in the water they receive from the Bureau of Reclamation under California water law of prior appropriation. Petitioners' Brief on the Merits, p. 36. This is an erroneous characterization of

Petitioners' interests in the water they receive from the Bureau of Reclamation. Petitioners do not cite any law, California or otherwise, to support their statement of an equitable property interest. *Id.* at p. 36. Presumably they intend to rely on the land owner "trust" theory articulated by the California Supreme Court in *Ivanhoe Irrigation District v. All Parties* (*Ivanhoe I*), 47 Cal.2d 597 (1957) and overruled by *Ivanhoe v. McCracken*, 357 U.S. 275 (1958).

In *Ivanhoe I* the California Supreme Court held that the Bureau of Reclamation holds the water rights secured by the Federal Central Valley Project in trust for the benefit of the beneficiaries of that trust – individual water users of the state like the Petitioners in this case. *Id.*, 47 Cal.2d at 627-628. The Court overruled *Ivanhoe I* in *Ivanhoe v. McCracken*, 357 U.S. 275. On remand, the California Supreme Court expressly repudiated the trust theory that it had carefully set forth in *Ivanhoe I*. *Ivanhoe II*, 53 Cal.2d at 715-716.[3] "Thus the trust theory is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California." *Id.*

[3] The California State Water Resources Control Board has rejected the land owner trust theory in Decision 1641. Revised Water Rights Decision 1641, pp. 126-127 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. The Sacramento Superior Court, a California trial court, has upheld that portion of the State Board's reasoning under D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 47-49 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. This issue is currently under consideration by the California Court of Appeal, Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

B. PETITIONERS HAVE NO REAL PROPERTY INTEREST APPURTENANT TO THEIR LAND

Petitioners also claim that their interest in the water is appurtenant to their land, and that this means they have a real property right in the water. Petitioners' Brief on the Merits, p. 36. Petitioners' reference to the concept of appurtenance does not establish a property interest under California law in the water they receive from the Bureau of Reclamation.

In California, the appurtenance theory is a restraint on out-of-project transfers of Central Valley Project water and not a basis for establishing a property interest in water Petitioners receive from the Bureau of Reclamation. California's appurtenance concepts establish that an appropriative right has an authorized place of use. California Water Code §1260(f). To change that authorized place of use, a water right holder must obtain permission from the California State Water Resources Control Board. California Water Code §§1701, *et seq*.

Water Code section 1702 states as follows:

> Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the [California State Water Resources Control] board, and it shall find, that the change will not operate to the injury of any legal users of the water involved.

California Water Code §1702.

"Section 1702 codifies the common law 'no injury' rule that an appropriator can make a change in its water right so long as the change is not injurious to other water right holders." Revised Water Right Decision 1641, at p. 91 (Cal.

St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf (citing *City of San Bernadino v. City of Riverside*, 186 Cal. 7, 28 (1921), Code Commission Notes to Water Code §1700, Hutchins, The California Law of Water Rights (1956) pp. 176-177, Final Report, Governor's Commission to Review California Water Rights (1978) pp. 64-65). The legislative history of Water Code section 1702 indicates that "the legislature, in using the concept 'legal user,' did not intend to include those persons who use water provided under contract with a water supplier entity, such as the Central Valley Project." *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 46, *see* discussion 43-46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF.

Although Petitioners' land may be a designated place of use for the water they receive from the Bureau of Reclamation, it does not follow that under California water rights law, the Petitioners have a real property interest in that water even if the Court were to consider them to be a "legal user" of water under section 1702.[4]

[4] The California State Water Resources Control Board has rejected the argument that contractors who receive water from the Central Valley Project are legal users of water under California Water Code section 1702. Revised Water Rights Decision 1641, pp. 129-130 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. The Sacramento Superior Court, a California trial court, has upheld this portion of the State Board's reasoning under D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 46, *see* discussion 43-46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. This issue is currently under consideration by the California Court of Appeal,

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California appurtenance theory also establishes that conveyance of real property may include the conveyance of a water right associated with that property. *Senior v. Anderson*, 138 Cal. 716, 723 (1903). Under certain circumstances, a water right, when acquired, can become an easement appurtenant to the land upon which the water is used and may be passed with possession and title to the land. *Stanislaus Water Co. v. Bachman*, 152 Cal. at 724-725. In *Stanislaus Water Co.* the terms of the contract between the private water company and an individual landowner included terms that expressly made the right to receive water "a covenant to and with the said land." *Stanislaus Water Co.*, 152 Cal. at 720. California's law of appropriative rights does not, however, require that the appropriator of water own the land upon which the water will be used. *See generally*, Hutchins, The California Law of Water Rights (1956) pp. 70-71. Consequently, an appropriator can appropriate water in order to provide it to another. *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 34 (1929).

In this case, the United States Bureau of Reclamation is the permit owner for the water right at issue.[5] Westlands

Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

[5] To the extent that Petitioners may argue that the terms of the permits issued to the United States contain terms that create a property right appurtenant to their land, they are incorrect. *See* Petitioners' Brief on the Merits, p. 6. The Water Rights Decisions cited by Petitioners, D-893, D-990, and D-1020, contain language that the right "is subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use." Decision D-893, p. 73 (Cal. St. Water Res. Control Bd. 1958) available at http://www.waterrights.ca.gov/hearings/decisions/WRD893.PDF, Decision D-990,

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Excerpts of Record, filed 6/25/01, p. 233. The contract between the Bureau of Reclamation and Westlands Water District does not include a term which establishes an easement running with Petitioners' land. Joint Appendix On Writ of Certiorari, pp. 27-92. Rather the Central Valley Project Improvement Act follows California law regarding change of place of use, allowing the Bureau to change the place of use if it complies with California law. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a) (Oct. 30, 1992).

The question remains under California law what is the nature of Petitioners' interest in the water they receive from the Bureau of Reclamation. Petitioners have no property interest in the water right held by the Bureau of Reclamation. Petitioners have merely a contractual interest in receiving a portion of the water appropriated by the United States through its water right permit. *See, Consolidated Peoples Ditch Company v. Foothill Ditch Co.*, 205 Cal. 54, 62-64 (1928); *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189, 194 (1964).

Petitioners' interest is defined and limited by their legal relationship with the Westlands Water District under California Water Code §§34000, *et seq.*, 35420, *et seq.* & 37800, *et seq.*, and the terms of the contracts which were fairly negotiated between the Westlands Water District

p. 88 (Cal. St. Water Res. Control Bd. 1961) available at http://www.waterrights.ca.gov/hearings/decisions/WRD990.PDF, Decision D-1020, p. 23 (Cal. St. Water Res. Control Bd. 1961) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1020.PDF. The permits clearly contemplate the change of place of use under state law, which is inconsistent with Petitioners' theory of a vested water right in the water they receive from the Bureau of Reclamation.

and the Bureau of Reclamation. Joint Appendix On Writ of Certiorari, pp. 27-92. *See, Consolidated Peoples Ditch Company*, 205 Cal. 54, 62-64; *City of Glendale v. Cresenta etc. Water* Co., 135 Cal.App.2d 784, 801-802 (1955). Petitioners have no other California common law-based property interest in the water they receive from the Bureau of Reclamation.

II. THE COURT SHOULD NOT RELY ON THE *ICKES* LINE OF AUTHORITY TO GIVE PETITIONERS AN EQUITABLE PROPERTY RIGHT IN THE WATER THEY RECEIVE FROM THE BUREAU OF RECLAMATION WHICH WOULD CONFLICT WITH CALIFORNIA WATER LAW

Ickes, 300 U.S. 82, *Nebraska*, 325 U.S. 589, and *Nevada*, 463 U.S. 110, do not give Petitioners a property right in the water they receive from the Bureau of Reclamation. *See* Petitioners' Brief on the Merits, pp. 37-41; Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, pp. 20-21. *Amici Curiae* describe these cases as a body of "Western water law." *Id.* p. 20. Western water law is not a uniform body of law. Rather it is made up of the distinct water laws of the individual western states.

The *Ickes* line of authority does not give Petitioners a property interest in the water they receive from the Bureau of Reclamation inconsistent with their rights under California water law.[6] In *Ickes* the Court held that

[6] Petitioners identify a body of federal common law that applies to reclamation contracts between the Bureau of Reclamation and individual water districts. *See* Petitioners' Brief on the Merits, p. 23, citing *Ivanhoe Irrigation District v. McCracken*, 357 U.S. at 289. In *Ivanhoe*

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the United States was not an indispensable party to a lawsuit brought by farmers in Washington against the Bureau of Reclamation. *Ickes*, 300 U.S. at 96-97. In concluding that the United States did not become the owner of water rights at issue, the Court relied on Section 8 of the Reclamation Act, 42 U.S.C. §372, and Washington state law. *Ickes*, 300 U.S. at 93-94. The applicable Washington state law provided that:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.

300 U.S. at 94, fn.3 citing Laws of Wash., 1917, c.117, §39, p. 465; Laws of Wash., 1929, c.122, §6, p. 274, Rem.Rev.Stat. §7391, vol. 8, p. 425.

In *Nebraska* and *Nevada* the Court followed the same basic analysis as it utilized in *Ickes* looking to applicable federal statutory and state law to determine the existence and nature of the property interest at issue in those cases. *Nebraska,* 325 U.S. at 599-600, 611-615; *Nevada*, 463 U.S. at 121-127.

In the context of a specific appurtenance requirement under Nevada law, similar to the state of Washington requirement analyzed in *Ickes*, the Court stated:

> [W]e conclude that the government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree of 1944 for

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the Court referred to federal common law to interpret rights and obligations under the contract, not to determine any property interest in water rights separate from the contract terms. *Ivanhoe Irrigation District v. McCracken,* 357 U.S. at 289.

> use in irrigated lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted as the Government might see fit.

Nevada v. United States, 463 U.S. at 126. Unlike the Nevada and Washington law analyzed in *Ickes* and *Nevada*, California law does not treat appurtenance as meaning that an appropriative water right is inexorably tied to the land it may have originally irrigated. Consequently, in California, water subject to a water right is transferable temporarily or more permanently. *See* California Water Code §§1700, *et seq.*, 1725, *et seq.* This creates a robust water market unconnected to the original place of use of the water transferred. *Id.*

The Reclamation Act provides that California law controls the appropriation and distribution of water under the Central Valley Project unless inconsistent with express congressional directives. *California v. United States*, 438 U.S. 645, 674-679. Under California law, Petitioners have no property interest in the water right held by the United States. *Ivanhoe II*, 53 Cal.2d at 715-716. California's appurtenance provisions do not establish that the water or the appropriative water right becomes part of the land where it is used, and nothing in California's place of use limitation creates any property interest in Petitioners in the water they receive from the Bureau of Reclamation. *See* Argument sections I, A & B, above. The Central Valley Project Improvement Act follows California law in this respect and allows changes in place of use if California law is satisfied. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a).

CONCLUSION

Therefore, based on the above, in deciding the issue presented, the State of California requests that the Court not recognize a property right under California law in the water Petitioners receive from the Bureau of Reclamation through its contract with the Westlands Water District.

Dated: January, 2005

Respectfully submitted,

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